

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-v-

No. 01 Cr. 943 (LTS)

JORGE BRICENO,

Defendant.

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MEMORANDUM OPINION AND ORDER

Jorge Briceno (“Briceno” or “Defendant”) plead guilty on August 12, 2002, to a one-count indictment charging him and his co-defendant with conspiracy to distribute and possess with intent to distribute 100 grams and more of mixtures and substances containing a detectable amount of heroin, in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(B). His sentencing proceeding commenced with a Fatico evidentiary hearing held over six days between January 30 and April 16, 2003. The parties thereafter filed further briefs and the Court heard oral argument on August 12, 2003, concerning the sentencing issues addressed in this Memorandum Opinion.

Briceno seeks judicial determinations that (1) he is eligible under the “safety valve” provisions of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2 to be sentenced without regard to the ordinary five-year statutory minimum sentence for his crime of conviction,¹ (2) a reduction in the offense level for minor participant status is appropriate, and (3) he is entitled to a reduction in the offense level for acceptance of responsibility. He further seeks a downward departure from

¹ See 21 U.S.C. § 841(b)(1)(B) (West 2003).

the ordinary sentencing range under the Sentencing Guidelines on the ground of aberrant behavior, and argues that the Government is estopped from opposing the acceptance of responsibility reduction and from seeking any increase in the offense level for obstruction of justice. The Government disputes Briceno's eligibility for safety valve treatment and the propriety of a minor participant role adjustment, contends that the acceptance of responsibility reduction should be denied in light of what it asserts was false testimony given at the Fatico hearing, and further asserts that an obstruction of justice increase in the offense level is appropriate by reason of that testimony. The Court has considered carefully all of the evidence and arguments presented in connection with the Fatico hearing and has read thoroughly all of the parties' related written submissions. This Memorandum Opinion explains the Court's resolution of these disputed issues.

BACKGROUND

At the Fatico hearing Briceno, who is a floor refinisher and repairer of floor refinishing equipment by trade,² testified in substance as to the offense conduct that on September 21, 2001, the date of his arrest, he responded affirmatively to an invitation from his co-defendant friend and colleague (one "Mincho") to go out for the evening with two women. Tr. 1 at 33-35. When Briceno, who was driving his own car (Tr. 1 at 82), picked Mincho up in Manhattan, Mincho instructed him to drive to Queens to pick up a female friend and to pick up drugs. Tr. 1 at 35-36, 81. Briceno at first refused, and then agreed to accompany Mincho in return for \$800.00. (Tr. 1 at 36.) The two proceeded to a house in Queens, where they were

² Transcript of January 30 and February 5 and 10, 2003 sessions of Fatico hearing ("Tr.1") at 28.

given a plastic bag containing a quantity of heroin. Tr. 1 at 36-38. Briceno then agreed to drive Mincho and the heroin to another location four or five blocks away. Tr. 1 at 87-88. On the way to the second location, Briceno was troubled by a strong odor emanating from the package; Mincho explained that the package stank because the heroin had been carried by a person who had swallowed it. Mincho indicated that the stench could be reduced by wrapping the heroin in tape, and instructed Briceno to drive to a nearby store to purchase masking tape. Tr. 1 at 39, 90. Briceno did so, returned to the car, sat in the back seat and, following Mincho's instructions, began to wrap the heroin, which was in small packages, into tape-covered bundles of ten. Briceno and Mincho were arrested while engaged in this activity. Tr. 1 at 40, 91. Briceno testified that he had never before been involved in the sale and distribution of narcotics (Tr. 1 at 31, 50), although he had purchased cocaine in the past for personal use. Tr. 1 at 51-52.

Briceno, a married man whose wife and children were living in Colombia at the time of the arrest, also testified that he had never sought to go out with other women in that manner before the date of the arrest. Tr. 1 at 66-68. He further testified that, at the time he agreed to go out with Mincho and the women, he had held a ticket to fly to Colombia on September 22 for the purpose of visiting his wife and family. According to Defendant, he would have flown into Bogota or Cali, it would have taken him a week to travel from there to the town where his family reside, and he was nonetheless booked to return to the United States a week after his arrival in Colombia. He represented that the return booking was merely a holding date that he would have extended after his arrival in Colombia. Tr. 1 at 178-79, 202-204, 207.

Briceno further testified that a number of his cellular telephone conversations, intercepts of which were received in evidence, were about floor sanding supplies or equipment,

including a number of conversations on September 18 and 19, 2001, that were purportedly in aid of Briceno's agreement to obtain and rent several "edging" machines at high prices to a person who owned a club and had decided to go into the flooring business in or around September 2001.³ The Government contends that the conversations were in reality coded conversations concerning drug trafficking, and introduced testimony from a DEA agent regarding the communications practices of participants in the drug trade and the post-September 11, 2001 drug market in New York City. See Tr. 1 at 158-168. Briceno also testified to conducting on September 18, 2001, a cellular phone conversation concerning the edging machine transaction from a particular location. Other evidence indicated that Government surveillance placed him meeting at a different location at that time with Mincho and another individual and that both Mincho and the other individual had previously been convicted of drug trafficking offenses.⁴ Briceno asserts that he was merely mistaken as to his own location at the time of the call and that the meeting was an innocent one; the Government contends that he lied deliberately.

Briceno and other defense witnesses testified that certain terms (e.g., "fish ones," "blue ones") that the Government contends were used as terms for drugs are used at Briceno's workplace to refer to types of floor sanding equipment and related supplies.

³ Tr. 1 at 234 ff; Transcript of April 15-17, 2003, sessions of Fatico hearing ("Tr. 2") at 11 ff. Briceno testified extensively that floor sanding equipment became more expensive to acquire immediately after the September 11, 2001, World Trade Center attacks, as people took advantage of the opportunity to refinish their floors, presumably in connection with cleanup. Tr. 2 at 25-26, 36, 38, 40-42. The vendors from which Briceno testified he attempted to obtain machinery to supply to his client, are located in Queens, miles from the World Trade Center site.

⁴ Tr. 2 at 15-17, 23, 24, 176-182.

Estoppel

Defendant tendered his guilty plea in this case without the benefit of a plea agreement. Rather, pursuant to the suggestion of the Court of Appeals in United States v. Pimentel, 932 F.2d 1029, 1034 (2d Cir. 1991), the Government provided the Defendant with a letter setting forth the Government's view of the sentencing guideline calculations that it believed would apply in the event of a conviction. The letter, which was dated June 28, 2002, was delivered to Briceno's counsel prior to the guilty plea and in advance of a proffer session relating to Defendant's safety valve application. It included provision for a downward offense level adjustment to reflect acceptance of responsibility. At the July 17, 2002 proffer session, Briceno related an account of his activities in connection with the offense that was substantially consistent with his testimony at the Fatico hearing. (See Gov't Ex. 6.) Defendant's counsel asserts that, following the proffer session and before the plea was tendered to the Court, the Government confirmed that the Pimentel letter continued to reflect accurately the Government's view of the appropriate Sentencing Guidelines calculation.

Defendant contends that the inclusion of a provision for an acceptance of responsibility reduction and reiteration of that Guidelines computation position following the proffer session estop the Government from objecting to credit for acceptance of responsibility and from seeking an upward adjustment for obstruction of justice. Defendant's position is ill-founded. The Pimentel letter does not purport to function as an agreement between the Government and any party, specifically stating that it reflects the Government's then-current position and is for informational purposes only. It further informs Defendant that

Nothing in this letter limits the right of the [United States Attorney's] Office to change its position at any time as to the appropriate Guidelines calculation in this

case, and to present the sentencing Judge and/or the Probation Department . . . any and all facts and arguments relevant to the defendant's offense level, sentencing range, criminal history category and sentencing, which are available to the Office at the time of sentencing.

June 28, 2002, Letter from James B. Comey to Samuel A. Schmidt at 3.

The Government takes the position that its opposition to the acceptance of responsibility adjustment and advocacy of an obstruction of justice enhancement are based in significant part on its view that Defendant perjured himself at length post-plea, in the Fatico hearing, by falsely denying relevant conduct. See, e.g., U.S.S.G. § 3E1.1 comment 1(a). While the Government may have anticipated a safety valve application at the time it delivered the Pimentel letter it was not, and could not have been, aware of the precise nature or the extent of any testimony that the Defendant would tender to the Court, under oath, following the plea. Nothing in the Pimentel letter purports to waive the Government's right to take positions based on subsequent events, including alleged perjury in the context of a later evidentiary proceeding before a judicial officer. Accordingly, Defendant's estoppel argument is without merit.

Safety Valve

Section 3553(f) of Title 18 of the United States Code and section 5C1.2 of the Sentencing Guidelines⁵ permit a court to sentence a defendant pursuant to the Guidelines and without regard to any statutory minimum sentence if the court makes certain findings. The only one of the relevant findings that is in dispute here is whether,

not later than the time of the sentencing hearing, the defendant has truthfully

⁵ The Court applies the November 2000 version of the Sentencing Guidelines. See infra note 6.

provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.

18 U.S.C. § 3553(f)(5) (West 2000); U.S.S.G. § 5C1.2(5). The Government recommends against safety valve treatment for Briceno, arguing that his accounts of his offense involvement, at the pre-plea proffer session and in the course of the Fatico hearing, were materially false in that they did not disclose accurately Defendant's role in the offense conduct and concealed what the Government contends was Briceno's significant ongoing role in drug trafficking.

A defendant seeking safety valve treatment has the burden of proving by a preponderance of the evidence that he meets all of the relevant criteria. United States v. Ortiz, 136 F.3d 882, 883 (2d Cir. 1997); United States v. Gambino, 106 F.3d 1105, 1110 (2d Cir. 1997); U.S.S.G. § 6A1.3 p.s. commentary. Here, the Government asserts that Defendant lied about his involvement with drugs in general and about the extent of his role in the transaction that resulted in his arrest. According to the Government, Briceno's phone conversations (including those about "fish ones" and "blue ones"), his personal involvement with Mincho and other involved in the drug trade, and the sheer implausibility of Briceno's assertions that he meant to go out with women for the first time on the night before a scheduled trip home to see his wife and that numerous conversations in the immediate post-September 11th period regarding short supplies and high prices of "edgers" and related items were merely about setting someone up in the flooring business make it plain that Briceno has not truthfully provided it with all of the information that he has concerning the offense of conviction or offenses that were part of the same scheme or plan. Indeed, as will be discussed infra, the Government contends that Briceno willfully lied as to material matters in the course of the Fatico hearing as well as during his

proffer sessions.

The Court, having listened carefully to all of the witnesses and reviewed thoroughly the parties' evidentiary and argumentative proffers, finds that Defendant has failed to meet his burden of proving that he has truthfully disclosed all information and evidence that he has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. While the Court is not convinced that Defendant was involved as extensively in the drug trade as the Government contends he was, the Court does not find credible Defendant's protestations of inexperience with drug sales or his explanations of his activities on September 18-19 and 21, 2001.

As to Briceno's conduct on the date of the arrest, the Court does not believe that a stranger to the heroin trade who believed that he had agreed merely to make a five-block drive to transport Mincho and the heroin to another location would, when offended by the stench of drug packets recently expelled from a human being's intestinal tract, volunteer to handle those packets in order painstakingly to wrap them in tape, all the while prolonging his own contact with the packets and their presence in his personal automobile. Nor does his assertion that he intended to go out with women for the first time on the night before a trip to Colombia for the purpose of seeing his wife and family, ring true. His explanation of his travel arrangements and anticipated timetable for visiting his family in Colombia were also incredible – if he expected that it would take a week to travel from the airport to his family's town, why would he have purchased a return ticket for a plane scheduled to leave only a day or two after he expected to reach his family's town? As to the events of September 18-19, 2001, the Court finds unconvincing Defendant's account of the supposed plan to provide edging machines to the club owner, and also finds

unconvincing Defendant's account of a sudden shortage and price spike in the market for edgers. While it may be that the terms used by Defendant with his friends and colleagues are indeed ones used in the floor refinishing business and that some of the conversations cited by the Government related to floor refinishing or other innocent activities, it would not be illogical for persons involved in a drug transaction to use familiar terms as euphemisms. Defendant's account of his activities in connection with the "edgers" and the September 18th meeting strains credulity at best.

The Court is not convinced that Defendant has truthfully provided all of the information and evidence in his possession concerning the drug transaction for which he was arrested and his other dealings with Mincho. Accordingly, Defendant's request for safety valve treatment is denied.

Minor Role Adjustment

Defendant seeks a finding that he was a minor participant in the offense of conviction and, pursuant to section 3B1.2(b) of the Sentencing Guidelines, an offense level reduction based on that status. Here, too, Defendant bears the burden of establishing the propriety of the adjustment by a preponderance of the evidence. As explained above, the Court does not believe that Defendant has been fully forthcoming about his involvement in the offense of conviction and related activities. The evidence presented at the Fatico hearing suggests that Defendant played a greater role in the offense than he has acknowledged. Accordingly, the Court finds that Defendant has not met his burden and will not employ a reduction pursuant to U.S.S.G. section 3B1.2(b) for minor participant status in connection with sentencing calculations.

Obstruction of Justice Adjustment

The Government, consistent with its thesis that Defendant was in fact a major drug trafficking figure, argues that Defendant perjured himself in material respects in the course of the Fatico hearing and that his offense level should therefore be increased by 2 levels pursuant to U.S.S.G. § 3C1.1, for obstruction of justice. To warrant such an increase, the Government must demonstrate, by clear and convincing evidence, that the Defendant

(A) . . . willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense

U.S.S.G. § 3C1.1. See United States v. Walsh, 119 F.3d 115, 121-22 (2d Cir. 1997) (clear and convincing standard). The Commentary to the Guideline explains that perjury, and “providing materially false information to a judge,” warrant application of the obstruction of justice adjustment. Material information means, for this purpose, “information that, if believed, would tend to influence or affect the issue under determination.” U.S.S.G. § 3C1.1, comments 4, 6.

The Government has not met its burden with respect to this adjustment. While, as explained above, the Court is not convinced that the Defendant has been completely truthful about his involvement with drugs and his role in the events at issue, the Government has not shown by clear and convincing evidence that Defendant's actual involvement, or the conduct relevant to the offense of conviction, was so extensive as to make the Defendant's questionable testimony perjurious or materially false in the sense of the Commentary. Accordingly, the Court will not adjust upward Defendant's offense level pursuant to U.S.S.G. section 3C1.1.

Acceptance of Responsibility Adjustment

The Sentencing Guidelines calculations set forth in the Pimentel letter and Presentence Investigation Reports delivered in connection with Defendant's prosecution include 3-level reductions for acceptance of responsibility. It is ordinarily the practice in this District to afford a defendant the 2-level reduction pursuant to U.S.S.G. § 3E1.1(a) based on an allocution to offense conduct sufficient to support a conviction, and the Government has typically acceded to an additional 1-point reduction pursuant to U.S.S.G. § 3E1.1(b) where the plea is proffered substantially in advance of trial and the offense level exceeds 16.⁶ The Government now opposes any credit to Defendant for acceptance of responsibility, arguing that Defendant's obfuscation of the extent of his offense-related conduct and alleged obstruction of justice in connection with the Fatico hearing make such credit inappropriate.

As explained above, the Government has failed to meet its burden of establishing by clear and convincing evidence that Defendant engaged in obstruction of justice within the meaning of U.S.S.G. section 3C1.1 in connection with the Fatico hearing. Defendant's plea allocution, and his testimony at the Fatico hearing, acknowledge his participation in a conspiracy to possess the heroin in question, with intent to distribute it. With these admissions, Defendant

⁶ Effective April 30, 2003, Public Law 108-21 directly amended U.S.S.G. § 3E1.1(b) to require a motion on the part of the Government to qualify a defendant for the addition 1-point reduction. Based on the Government's position in this case with regard to the propriety of the acceptance of responsibility adjustment, the Court assumes that no such motion will be forthcoming here if the Court finds section 3E1.1 applicable in connection with its sentencing determination. Under these circumstances, application of the amended Guideline would result in a harsher sentence than would application of the Guideline in effect at the time of the offense conduct (i.e., September 2001). Accordingly, pursuant to U.S.S.G. § 1.B.1.11, the Court will employ the November 2000 version of the Sentencing Guidelines for its calculations as to Mr. Briceno.

has accepted responsibility for the offense of conviction well in advance of trial and the Court finds on this basis that the 3-point downward offense level adjustment is warranted.

Downward Departure Application

Defendant seeks a downward adjustment for aberrant behavior, pursuant to the Sentencing Commission's policy statement set forth in section 5K2.20 of the Sentencing Guidelines. This application must be denied. Section 5K2.20 specifically provides that, while a downward departure "may be warranted in an extraordinary case if the defendant's criminal conduct constituted aberrant behavior," the court "may not depart . . . on this basis if . . . the instant offense of conviction is a serious drug trafficking offense." Application Note 1 to the section defines "serious drug trafficking offense" to mean "any controlled substance offense under Title 21, United States Code, other than simple possession under 21 U.S.C. § 844, that, because the defendant does not meet the criteria under § 5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases), results in the imposition of a mandatory minimum term of imprisonment upon the defendant."

As explained above, Defendant does not meet the criteria of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2. Accordingly, the statutory mandatory minimum term of imprisonment will apply pursuant to 21 U.S.C. § 841(b)(1)(B) and the aberrant behavior ground for departure is unavailable. The Court further notes that, even if consideration of the aberrant behavior departure ground were not precluded by the denial of the safety valve, the evidence presented at the Fatico hearing did not establish by a preponderance of the evidence circumstances so extraordinary as to warrant a downward departure for aberrant behavior. The Court is left with

serious doubt as to whether the offense conduct was aberrant for Defendant at all. On this record, no aberrant behavior departure is appropriate.

CONCLUSION

For the foregoing reasons, Defendant's application for "safety valve" treatment pursuant to 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2 is denied; Defendant's application for a minor role adjustment pursuant to U.S.S.G. § 3B1.2 is denied; Defendant's application for a downward departure pursuant to U.S.S.G. § 5K2.20 on the basis of aberrant behavior is denied; the Government's application for an upward adjustment for obstruction of justice pursuant to U.S.S.G. § 3C1.1 is denied; and Defendant will be granted a 3-point downward offense level adjustment pursuant to U.S.S.G. § 3E1.1 for acceptance of responsibility. The November 2000 version of the Sentencing Guidelines Manual will be applied in determining Defendant's sentence.

The sentencing of Mr. Briceno is scheduled to continue on September 10, 2003 at 3:00 p.m.

SO ORDERED.

Dated: New York, New York
August 29, 2003

/s/
LAURA TAYLOR SWAIN
United States District Judge